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In the

Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER v. ROBERT GATES, ET AL., RESPONDENTS	OMAR KHADR, PETITIONER, v. GEORGE W. BUSH, ET AL., RESPONDENTS

On Petition for Writ of Certiorari and Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

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I. ARGUMENT

Petitioners – in stark contrast to the parties to *Boumediene and Al Odah v. United States*, 549 U.S. – (2007) (denying certiorari) – are individuals who face imminent trial before a military commission with the power to impose a sentence of life imprisonment or even death. After five years and counting, the government's main argument once again comes down to urging further delay. It rehashes the same arguments it made in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that this Court should decline to hear this case and instead let the criminal proceedings unfold. Just as the Court properly rejected the government's exhaustion claims then, it should do the same now.

1. Although "traditional rules governing [the] decision of constitutional questions, and [the] practice of requiring the exhaustion of available remedies," *Boumediene*, 549 U.S. – (statement of Stevens, J., and Kennedy, J.), sometimes require this Court to defer review, the time to hear this particular case is now.

a. *First*, Respondents plan imminently to try Petitioners in criminal tribunals with the power to impose life imprisonment and even the death penalty. Unlike the petitioners in *Boumediene* and *Al Odah*, who currently face detention but not trial, Hamdan and Khadr face imminent trials that will indelibly alter their legal status and threaten their very lives. *See Boumediene*, *supra* (stating that the case would be different if there were "some other and ongoing injury").

Second, the right Petitioners seek to vindicate is the right not to be tried at all by an unconstitutional military commission, a right that obviously cannot be vindicated through even the best intentioned *post hoc* review. Pet. at 21. Petitioners are irreparably harmed by having to defend themselves in trials where they are kept ignorant as to whether or not the Constitution protects them and governs the procedures by which their prosecutions are allowed to proceed. *See* Pet. at 11 n.9. These rights will be impossible for the federal courts to fully vindicate ex post. *See infra* p.8; *Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) (en banc) ("[A] portion of the constitutional protection [the Double Jeopardy Clause] affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal level." (citing *Abney v. United States*, 431 U.S. 651, 660 (1997)).

Indeed, a trial will irreversibly provide the prosecution a preview of Petitioners' defense and trial strategy, a compelled disclosure that unquestionably "prejudice[s] the position of [P]etitioners." *Boumediene*, 549 U.S. – , slip. op. at 2. *See Rafeedie v. INS*, 880 F.2d 506, 517-18 (D.C. Cir. 1989) ("Rafeedie's second claim of injury is that the practical necessity to provide, in the § 235(c) proceeding, all information about his activities abroad *will prejudice him* in any later exclusion proceeding. Rafeedie will suffer a judicially cognizable injury in that he will thus be deprived of a 'substantial practical litigation advantage.' . . . if he presents his defense in a § 235(c) proceeding, [] the INS will nevertheless know his defense in advance of any subsequent § 236 proceeding; if, however, he does not present his factual defense now, he risks forsaking his only opportunity to present a factual defense. . . Rafeedie has thus established a *significant and irreparable injury*") (emphasis added).

Third, the reputation of the United States is on the line in these novel and untested trials. Both the Secretary of Defense and Secretary of State have expressed opposition to the trials.[1] The recent plea of David Hicks has cast further doubt on the ability of these commissions to prosecute cases fairly.[2] These trials, which bring to bear the most awesome powers of government, are slated to take place in Guantanamo—a place that is, according to the decisions below, exempt from our most deeply-held constitutional guarantees. If they go forward within that legal vacuum, the process will ultimately cast doubt on this nation's judicial system and our hallowed traditions of fairness in the eyes of the world. As

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[1] Defense Department Budget for FY2008: Hearing of the Defense Subcomm. of the House Appropriations Comm., 110th Cong. (March 29, 2007) (testimony of Secretary Robert Gates, U.S. Dep't. of Defense); Thom Shanker and David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo Prison*, N.Y. Times, Mar. 23, 2007 at A1.

[2] Editorial, *Guantanamo Follies*, N.Y. Times, Apr. 6, 2007 at A18 (criticizing the Hicks plea bargain as "emblematic" of the "lawless nature" of the Guantanamo facility); Editorial, *Spectacle at Guantanamo*, Wash. Post, Apr. 4, 2007 (David Hicks plea shows that the military commission process can be "politically twisted in a way that would be inconceivable in a credible court of law"); Editorial, *A Plea Tainted by Guantanamo*, Canberra Times, Mar. 29, 2007 (stating that the military commission process "highlights the willingness of the US Government . . . to sidestep the rule of law [and] ignore accepted conventions of human rights").

Justice Rutledge warned: "It is not too early, it is never too early, for the nation steadfastiy to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late." *In re Yamashita*, 327 U.S. 1, 41-42 (1946) (Rutledge, J., dissenting).

Fourth, a habeas petitioner is not required to exhaust remedies that are inadequate or ineffective at protecting the rights of the petitioner. *See* R. Hertz & J. Liebman, 2 Federal Habeas Corpus Practice & Procedure § 23.4(a), at 1095 (5th ed. 2005); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (habeas petitioner has no obligation to exhaust inadequate remedy); *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (same). The DTA procedures are a wholly inadequate substitute for true habeas review. *See* Pet. at 21-23. Moreover, the government's assurances that Hamdan and Khadr will be able to argue their claims of constitutional violations to the D.C. Circuit on DTA review ring hollow. Opp. at 14. That Circuit has already squarely held that detainees such as Hamdan and Khadr enjoy *no* constitutional rights that could be violated. Pet. App. at 62a-67a. Such an argument would be fated to fail before it was even made, rendering exhaustion futile.[3] For these reasons, the Petitioners are under no obligation to exhaust the DTA procedures, since any trial would take place against the backdrop of the Court of Appeals' decision holding no constitutional rights for those at Guantanamo.[4]

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[3] *See, e.g., Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997) (finding "that exhaustion would have been futile" and therefore unnecessary where the state supreme court had previously rejected the claim in other cases); *Blackledge v. Perry*, 417 U.S. 21, 23-24 (1974) (futility found because state supreme court "had consistently rejected" similar claims and no exhaustion required). Even in the absence of futility, exhaustion is not an immutable rule barring this Court's review. *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (habeas exhaustion not required where "'special circumstances'" render "prompt decision of the issues raised [] desirable.").

[4] Moreover, Petitioners could not have exhausted their remedies under the DTA before bringing this habeas action in federal court for the simple reason that the DTA did not exist at the time their habeas petitions were filed. Hamdan filed his habeas petition in April 2004 while Khadr filed his petition in July 2004, predating the December 2005 DTA. But it is well-settled that a habeas petitioner is not required to exhaust procedures that *do not exist* at the time his petition was filed. *See* Hertz & Liebman, *supra* at 1093.

b. Finally, and most importantly, this Court has already squarely rejected the government's arguments. In *Hamdan*, the government spent considerable time arguing that Mr. Hamdan was required to go through his trial and exhaust the review procedures in the DTA, including D.C. Circuit review. Resps.' Mot. Dis. at 17, No. 05-184 ("judicial review of military commission proceedings should occur only after those proceedings have been completed"); Resps.' Merits Br., No. 05-184 at 12-15. This Court flatly rejected all of these contentions, holding that both the Petitioners and the government "have a compelling interest in knowing in advance whether [the Petitioners] may be tried by a military commission that arguably is without basis in law." *Hamdan*, 126 S. Ct. at 2772; *see also Ex parte Quirin*, 317 U.S. 1, 19 (1942) (review on expedited basis prior to conclusion of trial because of the "*public interest*") (emphasis added).

Delaying this Court's inquiry into the constitutionality of the deprivation of habeas review when Petitioners are facing life imprisonment and the death penalty serves no purpose.[5] The claims forwarded by Petitioners are pure questions of law concerning whether they retain the right to habeas review and whether the Constitution protects them in the commission process. Nothing would be gained by answering these questions after DTA review, instead of now. As this Court held in this very case, "review of the [military commission] procedures in advance of a 'final decision'—the timing of which is left entirely to the discretion of the President under the DTA—is appropriate." *Hamdan*, 126 S. Ct. at 2788.

Had this Court accepted Respondents' previous invitation to abstain, the result would have been dozens of trials under the President's military commissions with convictions that this Court would have had to overturn since that system did not comply with our laws. This Court correctly avoided that terrible result then, and

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[5] Just as in *Hamdan*, 126 S. Ct. at 2771, neither of the concerns mitigating towards abstention in *Councilman* applies here – there is no threat to military discipline from review since Petitioners are not military personnel and the review process under the DTA does not allow for plenary review by an authority independent of the military structure. The MCA provides for plenary review of a commission conviction only by a court comprised of military judges appointed by the Secretary of Defense. MCA § 950f. Such an appellate court clearly does not possess the "structural insulation from military influence" this Court required in *Hamdan*, 126 S. Ct. at 2771.

it should do the same now. If commissions are worth conducting, they are worth conducting lawfully and, almost as importantly, being *perceived* as so conducted. Only the Court's prompt and decisive resolution of the questions presented can dispel the clouds that hang over this process in a swift and certain manner.

2. For the above reasons, this petition raises issues of vital national and international importance requiring immediate determination. Moreover, this case is an appropriate vehicle to address these questions, particularly in light of the denial of the petitions for certiorari in *Boumediene* and *Odah*.[6]

The government attempts to argue that this Petition does not meet the standard for certiorari before judgment, trying to minimize the fact that the Court granted certiorari before judgment in *Ex parte Quirin*.[7] It observes that the Court has recently denied certiorari before judgment in a series of cases, including *Hamdan v. Rumsfeld*, No. 04-702. But this is no mere petition for certiorari before judgment: it includes the post-judgment petition of Mr. Khadr and seeks pre-judgment review on behalf of Mr. Hamdan; as the Petition demonstrates, this Court more regularly grants

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[6] The government argues that Supreme Court Rule 12.4 does not permit these petitions for certiorari to be joined. The government is incorrect. First, the Clerk's Office was required to check the petition for compliance with the Court's Rules before docketing it and accepted the joint petition without reservation. Second, the government's argument turns on the bizarre assumption that a "judgment" under Rule 12.4 may only be issued by a Court of Appeals. Such a restriction appears nowhere in the Rules themselves and the government tellingly offers no support for that proposition. In fact, it is well-settled that "judgments" issue from district courts as well as courts of appeal. Here, there are two judgments—one from the D.C. Circuit and one from the D.C. District Court—"sought to be reviewed on a writ of certiorari to the same court" under Rule 12.4—the D.C. Circuit, which currently has jurisdiction over both cases. As such, there is nothing in Rule 12.4 to prevent Hamdan's petition for certiorari before judgment to be joined with Khadr's ordinary petition for certiorari.

If this Court disagrees, it may simply deem the Petition two separate filings, analogous to its practice of deeming an application for a stay to be a Petition for Certiorari. That such an exercise would be pure formality brings into sharp relief the government's elevation of form over substance.

[7] The government is wrong to assert that *Quirin* was granted due to the "imminent execution" of the defendants. Opp. at 19. The defendants had not even been convicted at the time the Court heard the case, and the Court stated it heard the case because the "public interest" required it. 317 U.S. at 19. For that reason, the government cites to nothing at all in support of its revisionist history.

certiorari before judgment in such a companion case to ensure that it has before it appropriate vehicles to fully decide an issue on which review has been granted. *See* Pet. 9-10. The government also omits that in each of the cases it cites, the Court had not previously considered the case or issue, whereas here it has considered this very case already. The relevant precedents in this different context, are cases such as *Ins. Group v. Denver & Rio Grande W. R.R.*, 329 U.S. 607 (1947) and others cited at Pet. 11, where the Court granted certiorari before judgment when a case was coming back to the Court. Here, the case for certiorari before judgment is even stronger since the Petition presents a clean issue of immediate importance: Do the Constitution's fundamental guarantees apply to constrain a criminal trial at Guantanamo that is about to take place?

If this Court were to deny certiorari, trials at Guantanamo would begin against the backdrop of no constitutional rights at all. Defendants like Mr. Hamdan would be tried for offenses, such as conspiracy, that were not violations of the laws of war at the time of their alleged action. The government reassures the Court that Petitioners can raise their constitutional challenges to the D.C. Circuit which "should resolve that issue" first, Opp. at 25, forgetting that a mere 4 pages earlier they stated that the D.C. Circuit's decision in *Odah* and *Boumediene* had resolved these issues by stating that the Constitution does not apply to Guantanamo. Opp. at 21. The D.C. Circuit has said that no constitutional rights protect Petitioners, and therefore there is nothing left to exhaust.

2. a. Respondents contend that the Petitioners' claims as to the inadequacy of review of military-commission convictions under the DTA and MCA as a substitute for habeas review "add little to the arguments that have already been presented by the petitioners in *Boumediene* and *Al-Odah*." Opp. at 23. But as explained above, the claims raised by *Boumediene* and *Al-Odah* were *fundamentally* different from those raised by Petitioners here. Most importantly, petitioners in those two cases did *not* challenge the review process for "military-commission convictions." Rather, they *only* challenged the review process under the two statutes as it relates to CSRT determinations. Although the provisions governing review of commission convictions and CSRT determinations are similar, they are not identical in scope or function. Rather, review under the MCA is identical to the

procedures in place in *Hamdan* under the Detainee Treatment Act of 2005, where this Court *rejected* the government's exhaustion propositions. *Boumediene*, 549 U.S. – (Breyer, J., dissenting) ("[*Hamdan*] presented questions of the scope of the Guantanamo detainees' right to [] review of DTA-authorized procedures. We there rejected the Government's argument for delay as unsound.")

On the merits, the government disputes the various inadequacies of the DTA/MCA review process set forth in the Petition. Opp. at 23-26. Indeed, they elsewhere argue that the review under the MCA is somehow superior to traditional habeas review. Opp. at 14-16. These arguments are baseless.

First, by the government's own admission, common law habeas review addresses the "threshold jurisdictional question [of] whether the offense and offender were triable by military commission." Opp. at 15. But under the MCA, a CSRT finding "that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter." MCA § 948d(c). Thus, at the most basic level, the DTA/MCA review process cannot adequately substitute for common law habeas since a defendant lacks the ability to challenge the jurisdiction of the military commission—an inquiry even Respondents recognize as central to constitutional habeas.

Moreover, notwithstanding Respondents' claim to the contrary, common law habeas review is *not* limited to simply determining the jurisdictional question. Opp. at 15. Rather, the robust habeas system enshrined in the Constitution allows the Petitioners to challenge the conditions of their confinement, assert treaty-based claims against the government, and have a reviewing habeas court examine the sufficiency of the evidence in these unique military proceedings. Pet. at 21-23. Respondents' reliance on *In re Yamashita*, 327 U.S. 1 (1946) to suggest otherwise is unavailing. As this Court noted last Term, *Yamashita* "has been stripped of its precedential value." *Hamdan*, 126 S. Ct. at 2790. Furthermore, although *Yamashita* did not review the tribunal's specific evidentiary rulings, it did employ habeas review to determine whether the tribunal had admitted evidence in violation of "any act of Congress, treaty, or military command." 327 U.S. at 23. Likewise in *Quirin*, although the Court held that the military commission procedures were not in conflict with the Articles of War, there was no suggestion that such a challenge to commission procedures was beyond the power of the Court on habeas review

because that review was limited to the "threshold jurisdictional question" alone. *Quirin*, 317 U.S. at 47-48; *cf. Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (employing habeas review to examine not only the authority to detain but also the procedural framework to challenge detention as an enemy combatant).

Second, the government incorrectly asserts that Congress may jurisdictionally bar pre-trial claims "until an administrative or military ruling becomes final." Opp. at 24. The three cases it cites only support the limited proposition that, in the *administrative law* context, courts should fashion exhaustion principles consistent with congressional intent and the relevant statutory scheme. *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Booth v. Churner*, 532 U.S. 731 (2001); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). By contrast, in the military trial context, this Court has consistently held that "abstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all.'" *Hamdan*, 126 S. Ct. at 2770 n.16 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)). Even when civilian appellate review is ultimately available, pre-trial habeas review is not barred when the very power of the military system to legally try the defendant in the first instance is challenged. *Councilman*, 420 U.S. at 759; *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

Third, the government's claim that habeas review is not an appropriate vehicle for a condition-of-confinement claim is misguided and none of the authority cited by the government supports that proposition. Opp. at 24.[8]

Fourth, the government misunderstands Petitioners' argument that the DTA/MCA review is inadequate because it bars claims based on federal treaty obligations. Respondents urge that even with habeas rights, Petitioners could raise no treaty claims because MCA § 5(a) precludes the private enforcement of such claims.

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[8] Indeed, in *Preiser v. Rodriguez*, 411 U.S. 475, 499-500 (1973), after reaffirming that a prisoner may challenge the conditions of his confinement through §1983, the Court specifically stated that "[t]his is not to say that habeas corpus may not also be available to challenge such prison conditions." *Id.* And, in fact, the Court has repeatedly noted that such condition-of-confinement claims are properly the subject of habeas claims. *Wilwording*, 404 U.S. at 251 (stating that such a claim was "cognizable in federal habeas corpus"); *Johnson v. Avery*, 393 U.S. 483 (1969).

Opp. at 25. But the MCA can only bars courts from hearing treaty claims on statutory habeas petitions, not on common law constitutional habeas petitions, because the Suspension Clause, at a minimum, protects the latter species of habeas as it existed in 1789. *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). Early American cases show that common law habeas was understood to allow courts to review treaty-based claims.[9] Congress cannot force exhaustion in a process that fails to provide an adequate substitute for habeas. *Cf. Swain v. Pressley*, 430 U.S. 372, 377-78 (1977).

Moreover, the provisions of the MCA cited by the government as removing Petitioner's treaty-based claims from the ambit of habeas review are themselves unconstitutional. The Court has already held that Petitioners may invoke the Geneva Conventions as a source of protection, *Hamdan*, 126 S. Ct. at 2796, and has suggested that the Conventions create privately enforceable rights. *Id.* at 2794 n.57 & n.58. By purporting to strip federal courts of jurisdiction to hear treaty-based claims, the MCA unconstitutionally prevents implementation of this Court's decision in *Hamdan*. Pet. at 23-24; *see also* Amici Brief of Bruce Ackerman et al., No. 06-1169, at 18.[10]

Adequate procedural protections, such as those found in state court criminal proceedings or courts-martial, assure a reviewing court of the reliability of the factual findings and obviate the need for habeas review of factual determinations. *See Hamdan*, 126 S. Ct. at 2788 (noting that historically military commissions and

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[9] *See, e.g., Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17-18 (1887); *Saint Fort v. Ashcroft*, 329 F.3d 191, 201 (1st Cir. 2003) (noting the "long history of use of habeas by aliens to challenge confinement in violation of treaty obligations").

[10] Respondents also rely on *INS v. St. Cyr*, 533 U.S. 289 (2001), for the proposition that "traditional habeas review" did not encompass a review of the Executive's factual determinations but was, rather, limited to pure questions of law. Opp. at 15. But as *St. Cyr* itself makes clear, the case was not about "traditional habeas review" but instead concerned habeas "to test the legality of [a] deportation order." 533 U.S. at 306. As the cases cited herein and in the Petition make clear, traditional habeas review over claims by enemy aliens does involve a review of factual determinations. Pet. at 23; *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (examining an affidavit from alleged alien enemies); *King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (same); see also Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 457 (1966).

courts-martial operated by the same procedural rules); 28 U.S.C. § 2254(e). Because the MCA departs from the historical congruence of commission and court-martial procedures, its proceedings do not deserve the same deference when reviewed on habeas.[11]

II. CONCLUSION

The Court should grant certiorari to hear Petitioners' constitutional claims now, instead of forcing further review in a court that has already effectively rejected them.

Respectfully submitted.

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[11] Respondents only briefly respond to Petitioners' constitutional claims and do so unconvincingly. Opp. at 21 n. 4. On the Bill of Attainder claim, the government first asserts that the MCA does meet the "specificity" element of a bill of attainder. *Id.* The government's claim is puzzling given its recognition that the MCA applies to a very specific group: "aliens determined by administrative processes to be enemy combatants or who are being held as enemy combatants while awaiting such determinations." *Id.* Nor does the open-ended nature of the group singled out by the MCA save it. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (striking down a state constitutional provision barring anyone who failed to take an oath from certain forms of employment). Likewise, the government's claim that the MCA does not work punishment conflicts with this Court's recognition that the deprivation of complete access to the courts is "punishment." *Pierce v. Carskadon*, 83 U.S. 234, 237-38 (1872).

Respondents' equal protection argument is similarly weak. They argue that the MCA does not impinge on a fundamental right because the MCA provides "adequate and appropriate" substitute relief. That claim is wrong. *See supra* pp. 7-9. Further, this Court has noted that habeas is among the rights "to be regarded as the very essence of constitutional liberty." *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971).

Respondents' claim that federal classifications based on alienage warrant only rational basis review is similarly misguided. In *Matthews v. Diaz*, 426 U.S. 67 (1976), this Court held only that in doling out scarce government benefits, Congress may differentiate between citizens and aliens as well as between classes of aliens. *Id.* at 78-79. But the Court made clear that, when liberty interests are at stake, the Fifth Amendment "protects every one of these [aliens] from deprivation of life, liberty, or property without due process of law" even when the alien's presence is "unlawful, involuntary, or transitory." *Id.* at 77. *Matthews* does not hold that the Equal Protection Clause requires only a rational basis to uphold discrimination against aliens of the type perpetrated by the MCA.

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